

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:11-CR-327 JCM (CWH)

Plaintiff(s),

ORDER

v.

MICHAEL PAUL MATULICH,

Defendant(s).

Presently before the court is Michael Paul Matulich's ("Matulich") renewed emergency motion for compassionate release. (ECF No. 188). The United States of America ("the government") filed a response (ECF No. 191).

I. Background

On December 10, 2012, Matulich was sentenced to 168 months in prison for conspiring to distribute a controlled substance and conspiring to unlawfully deal in firearms. (ECF No. 101). On August 22, 2017, the court reduced his prison sentence to 135 months pursuant to 18 U.S.C. § 3582(c)(2) as the Sentencing Commission retroactively lowered the sentencing range of his drug conviction. (ECF No. 171). Matulich's projected release date is May 14, 2022. (ECF No. 181 at 2).

While Matulich has been incarcerated at FCI Beckley, the novel strain of coronavirus and COVID-19, the resultant respiratory disease, have run rampant, especially in our country's prisons. The Centers for Disease Control ("CDC") warns that the virus can lead to "hospitalization, admission to the ICU, intubation or mechanical ventilation, or death," especially for older adults and people with certain serious and uncontrolled medical conditions. Centers for Disease Control, *Evidence used to update the list of underlying medical conditions that increase a person's risk of*

1 *severe illness from COVID-19*, (last updated July 28, 2020).¹

2 The government assures the court that the Bureau of Prisons (“BOP”) has taken
3 extraordinary precautions to minimize coronavirus transmission in its facilities. (ECF No. 184 at
4 11–13). But despite the BOP’s precautions, 1,378 inmates and 592 staff members have tested
5 positive for the virus and 114 inmates have died. Federal Bureau of Prisons, *COVID-19*
6 *Coronavirus*, (last visited August 19, 2020).² These grim numbers are likely understated as well
7 because testing in BOP’s facilities has been “scant except for people who self-report symptoms[.]”
8 *United States v. Esparza*, No. 1:07-CR-00294-BLW, 2020 WL 1696084, at *2 (D. Idaho Apr. 7,
9 2020) (footnote citation omitted).

10 Matulich previously filed an emergency motion for compassionate release, (ECF No. 177),
11 which was supplemented by his counsel on June 11, 2020. (ECF No. 181). The government
12 responded in opposition, (ECF No. 184), and Matulich filed a timely reply. (ECF No. 186). The
13 court denied the motion without prejudice because Matulich did not exhaust his administrative
14 remedies before seeking relief from the court as required by the First Step Act. (ECF No. 187).
15 Specifically, he did not request compassionate release for COVID-related reasons from the warden
16 at FCI Beckley. (*Id.* at 4). Matulich has since petitioned the warden and his request was denied.
17 (ECF No. 188-1). The court will now consider the merits of Matulich’s renewed compassionate
18 release motion. (ECF No. 188).

19 **II. Legal Standard**

20 The court can reduce a prison sentence for “extraordinary or compelling reasons” under
21 the compassionate release provision of 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step
22 Act of 2018, Pub. L. No. 115-391, 132 Stat. 5239 (Dec. 21, 2018). 18 U.S.C. § 3582(c)(1)(A).
23 This statutory authorization is a limited exception to the general rule that a court “may not correct
24 or modify a prison sentence once it has been imposed.” *United States v. Penna*, 319 F.3d 509, 511
25 (9th Cir. 2003) (citing 18 U.S.C. § 3582(c)).

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27 ¹ Available at [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/evidence-table.html)
28 precautions/evidence-table.html.

² Available at <https://www.bop.gov/coronavirus/>.

1 Before a defendant can move for compassionate release, he must first ask the BOP to do
 2 so on his behalf, typically by submitting a request to the warden. 18 U.S.C. § 3582(c)(1)(A). He
 3 must then exhaust all administrative rights to appeal the BOP’s denial of his request or wait thirty
 4 days for his request to go unanswered, whichever comes first. *Id.*

5 To grant compassionate release, the court must make two findings. First, there must be
 6 “extraordinary and compelling reasons” that warrant compassionate release and, second, release
 7 must be “consistent with applicable policy statements issued by the Sentencing Commission.” *Id.*
 8 The applicable Sentencing Commission policy statement lists specific circumstances related to the
 9 defendant’s medical condition, age, and family circumstances that are extraordinary and
 10 compelling.³ USSG § 1B1.13, cmt. 1. The policy statement also requires the court to consider
 11 whether the defendant is a danger to the community based on the factors set forth in 18 U.S.C. §
 12 3142(g). USSG § 1B1.13(2).

13 District courts have granted compassionate release under circumstances beyond those
 14 listed in the policy statement. *United States v. Regas*, No. 391CR00057MMDNA1, 2020 WL
 15 2926457 (D. Nev. June 3, 2020); *United States v. Arreola-Bretado*, No. 3:19-CR-03410-BTM,
 16 2020 WL 2535049 (S.D. Cal. May 15, 2020); *United States v. Kesoyan*, Case No. 2:15-cr-236-
 17 JAM, 2020 WL 2039028 (E.D. Cal. Apr. 28, 2020). That is because the policy statement was last
 18 substantively amended in November 2016, before the passage of the First Step Act in December
 19 2018. Courts have reasoned that Congress’s intent in passing the First Step Act—which allows
 20 inmates to move for compassionate release when the BOP declines to do so—was to entrust district
 21 courts to consider a variety of circumstances that could be extraordinary and compelling. *See*
 22 *Arreola-Bretado*, 2020 WL 2535049, at *2. The court agrees that its discretion to grant
 23 compassionate release is not strictly limited to the specific circumstances in the Sentencing
 24 Commission’s policy statement.

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 26 ³ The specific extraordinary and compelling circumstances are: (1) the defendant is either
 27 “suffering from a terminal illness” or some other serious condition “that substantially diminishes
 28 the ability of the defendant to provide self-care” in prison; (2) the defendant is at least 65 years
 old, is experiencing deteriorating health, and has served a substantial portion of his sentence; (3)
 certain family circumstances like the incapacitation of a spouse; and (4) other reasons “as
 determined by the Director of the [BOP].” USSG § 1B1.13, cmt. 1.

1 Lastly, the court must consider the sentencing factors set forth in 18 U.S.C. § 3553(a). The
 2 factors include: (1) the nature and circumstances of the offense and the history and characteristics
 3 of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4)
 4 the kinds of sentence and the sentencing range established in the Sentencing Guidelines; (5) any
 5 pertinent policy statement issued by the Sentencing Commission; (6) the need to avoid
 6 unwarranted sentence disparities among defendants with similar records who have been found
 7 guilty of similar conduct; and (7) the need to provide restitution to any victims. 18 U.S.C. §
 8 3553(a)(1)-(7).

9 **III. Discussion**

10 Matulich argues that he is at an increased risk of serious illness or death from the
 11 coronavirus because “[he] is 37 years old. He was diagnosed with Hepatitis C. He has hypertension
 12 and receives daily medication. He has a history of smoking and continues to experience lower back
 13 pain[.]” (ECF No. 181 at 8). Matulich further argues that he has served 81% of his sentence, poses
 14 a minimal risk to the community, and that the section 3553(a) sentencing factors favor his release.
 15 (*Id.* at 6). If released, Matulich plans to help his 74 year old mother care for her four foster children
 16 and help his fiancée care for her daughter who was born with health issues. (ECF No. 191 at 4).

17 The government opposes Matulich’s compassionate release request. (ECF Nos. 184 and
 18 191). It argues that his “medical records [and] mainstream medical evidence” do not support the
 19 “grave health picture” that Matulich paints. (ECF No. 191 at 15). The government paints its own
 20 picture of Matulich as a danger to the community because of his numerous juvenile adjudications
 21 and long prison disciplinary record which includes recent drug and alcohol violations. (*Id.* at 2–
 22 3).

23 The court finds that Matulich’s medical conditions are not extraordinary and compelling
 24 reasons that warrant compassionate release. The CDC warns that older adults and people with
 25 certain serious and uncontrolled medical conditions have an increased risk of severe illness and
 26 death from the coronavirus. Matulich is not an older adult; he is 37 years old.⁴ And the CDC

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 28 ⁴ The BOP’s denial of Matulich’s compassionate release request states that he is 38 years
 old. (ECF No. 188-1 at 3). This discrepancy is immaterial.

1 currently has no information about whether Hepatitis C increases the risk of serious coronavirus
 2 complications. Centers for Disease Control, *What to Know About Liver Disease and COVID-19*,
 3 (last updated May 5, 2020).⁵ As to hypertension, the CDC advises that it only might increase such
 4 risks. Centers for Disease Control, *People with Certain Medical Conditions*, (last updated Aug.
 5 14, 2020).⁶

6 The cases that Matulich cites in support of his compassionate release all involved inmates
 7 that are markedly older than him and have very serious medical conditions in addition to Hepatitis
 8 C. *United States v. Hammond*, No. CR 02-294 (BAH), 2020 WL 1891980, at *9 (D.D.C. Apr. 16,
 9 2020) (75 year old inmate with Hepatitis C, hypertension, and prostate cancer); *Miller v. United*
 10 *States*, No. CR 16-20222-1, 2020 WL 1814084, at *1 (E.D. Mich. Apr. 9, 2020) (inmate with
 11 Hepatitis C, hypertension, COPD, liver cancer, and heart disease); *United States v. McGraw*, No.
 12 202CR00018LJMCMM, 2019 WL 2059488, at *1 (S.D. Ind. May 9, 2019) (72 year old inmate
 13 with Hepatitis C, diabetes, hypertension, among other medical conditions); *United States v. Gray*,
 14 416 F. Supp. 3d 784, 786 (S.D. Ind. 2019) (64 year old inmate with Type 2 diabetes, hypertension,
 15 hyperlipidemia, chronic constipation, and Hepatitis C).

16 Further, Matulich's medical records suggest that his Hepatitis C and hypertension are under
 17 control without any need for ongoing treatment. (ECF No. 190-2 at 20). *Cf. Miller*, 2020 WL
 18 1814084, at *1 ("[The defendant's] medications to treat most of his conditions have been
 19 continually renewed throughout his incarceration."). The applicable Sentencing Commission
 20 policy statement defines extraordinary and compelling reasons to include terminal illnesses and
 21 medical conditions "that substantially diminish the ability of the defendant to provide self-care
 22 within the environment of a correctional facility and from which he or she is not expected to
 23 recover." USSG § 1B1.13, cmt. 1. As aforementioned, the court will not strictly adhere to the
 24 Commission's outdated policy statement. Nevertheless, Matulich's circumstances are far from

25 ⁵ Available at [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/liver-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/liver-disease.html)
 26 [disease.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/liver-disease.html).

27 ⁶ Available at [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#serious-heart-conditions)
 28 [precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#serious-heart-conditions](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html#serious-heart-conditions).

1 what the Sentencing Commission would define as extraordinary and compelling. In short, the
2 court agrees with the government's assessment of Matulich's medical records. (ECF No. 191 at
3 15–16).


4 Because the court finds that Matulich's medical conditions are not extraordinary and
5 compelling reasons that warrant compassionate release, it will not address whether Matulich would
6 be a danger to the community if released.

7 **IV. Conclusion**

8 Accordingly,

9 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's renewed
10 emergency motion for compassionate release (ECF No. 188) be, and the same hereby is, DENIED.

11 DATED September 1, 2020.

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14 UNITED STATES DISTRICT JUDGE
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